No. 80-2176.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT C. HAGOPIAN,
PETITIONER,

v.

CLAYTON W. TREFRY, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Questions Presented

1. Whether the Court of Appeals for the First Circuit correctly determined that the petitioner did not possess a property interest in continued employment as Town Manager that was protected by the due process of the Fourteenth Amendment.

2. Whether this Court ought to grant certiorari to review a case which primarily involves the interpretation of Massachusetts State Law and which presents no conflict either with decisions of other Circuit Courts or with prior decisions of this Court.

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The respondents are not dissatisfied with the petitioner's statement of jurisdiction and citation to opinion below.

Statement of the Case

On January 21, 1974, the respondents, acting in their capacity as Selectmen of the Town of Saugus, appointed petitioner as Town Manager. Pursuant to the Town Charter, Mass. St. 1947, Ch. 17, §8, the appointment was for a term of five (5) years subject to removal as provided in said Chapter 17, Section 11.

Subsequently, the Board of Selectmen (hereinafter referred to as "the Board") became dissatisfied with petitioner's performance as Town Manager. Acting in accordance with the Town Charter, a majority of the Board adopted a preliminary resolution on September 27, 1974 to remove petitioner from office. The Board set forth the following reasons for its action:

1. The Board of Selectmen lack confidence in Robert C. Hagopian as Town Manager.
2. The Board of Selectmen believe that Robert C. Hagopian's performance as Town Manager has been unsatisfactory in that he has:

   failed to demonstrate a clear pattern of leadership for the Town as required by Chapter 17;

   failed to communicate effectively with the Board of Selectmen and with the Town Meeting on matters important to the future of the Town;

   consistently proven to be uninformed or misinformed on the status of programs such as the Two Million ($2,000,000.00) Dollar sewer program currently under way.

The plaintiff was notified of the Board's action and received copies of the resolution.

At petitioner's request, the Board agreed to hold a public hearing on the resolution on November 1, 1974. Prior to the hearing, petitioner was informed that the Board would adopt the procedural rules that had been established at the only other such hearing held under the Town Charter. The rules included the following:

1. The petitioner could present any statement, oral or written, that he desired;
2. The petitioner could present any witnesses he desired;

3. The petitioner could be represented by counsel;
4. No time limitation would be imposed upon statements or arguments presented by petitioner or his counsel; and
5. Any registered voter of the Town of Saugus would be allowed to speak.

At the hearing, the petitioner demanded that the Board of Selectmen be sworn so that he could cross-examine them under oath. When the Board, acting on the advice of Town Counsel, declined to be sworn, petitioner refused to participate in the public hearing, and in fact, left the meeting. The hearing was conducted in petitioner's absence, with numerous registered voters of the Town expressing their views, pro and con, on the merits of the proposed removal of petitioner from office. After all persons in attendance had an opportunity to speak, the hearing was closed.

On November 12, 1974, the Board adopted a final resolution of removal. At all times, the Board acted pursuant to and in accordance with the provisions of Section 11 of the Town Charter.

Petitioner then commenced this Civil Rights Action pursuant to Section 1983 of Title 42 of the United States Code, alleging that the respondents violated his Fourteenth Amendment right to due process in dismissing him from employment as the Town Manager. Respondents moved to dismiss, contending, *inter alia*, that the petitioner did not possess a property interest in continued employment that was protected by the Fourteenth Amendment. The Motion was denied by the Court, (Murray, D.C.J.) without opinion.

The action was subsequently tried before a jury, McNaught, D.C.J. presiding. At the close of petitioner's case, respondents moved for a directed verdict, again contending that under Massachusetts law the petitioner was an employee at will, and therefore did not have a property interest in continued

employment. The motion was denied and the issue of whether a property interest existed was submitted to the jury, which returned a verdict for petitioner against all respondents.

Upon appeal to the United States Court of Appeals for the First Circuit, the judgment in the lower court was reversed. The Court, in a per curiam opinion, emphasized that the key aspect of the Town Charter was that a Town Manager could be dismissed without cause. The Court further noted that under Massachusetts law, the Charter's requirement of a statement of reasons did not mean that the reasons must be sufficient to constitute legal cause, or even that they be true. Thus, the Court concluded that the Charter conferred no property interest upon the petitioner.

Reasons for Denying the Writ

I. The Court of Appeals Correctly Determined That the Petitioner Was Not Deprived of a Property Interest in Continued Employment as Town Manager of the Town of Saugus.

Petitioner submits that the First Circuit correctly interpreted both Massachusetts and federal law in dismissing petitioner's complaint. It is well settled that the nature of an individual's claim of entitlement to a specific benefit must be determined, in the first instance, by reference to state law. *Bishop* v. *Wood*, 426 U.S. 341, 344 (1978).[1]

[1] Petitioner contends that this court should accord deference to the two District Court judges in this case who have previously determined that the petitioner had a constitutionally-protected interest under the provisions of the Saugus Town Charter. Petitioner's argument is misleading and inaccurate. As previously noted, the District Court judge who denied the respondents' Motion to Dismiss did so without issuing an opinion. Thus, it is simply impossible to determine the basis for the court's ruling on that Motion.

In addition, the presiding judge at trial at no time made a ruling that petitioner had a constitutionally-protected interest. Rather, the trial court's

The Massachusetts law which applies to the present case is the Town Charter of the Town of Saugus, Mass. St. 1947, Ch. 17. The Charter provides that the Board of Selectmen may at any time remove the Town Manager by mere majority vote. There is absolutely no mention of any restriction upon the grounds for removal. The only qualification upon the removal authority of the Board is that the Board must take the following steps to effectuate the termination of the Town Manager:

1. Adopt a preliminary resolution setting forth the specific reasons for removal.
2. Deliver a copy of the resolution to the Town Manager.
3. Conduct a public meeting upon the request of the Town Manager.
4. After the public hearing, adopt a final resolution of removal.

The statute neither specifies nor limits the grounds upon which removal may be predicated. The clear and unambiguous meaning of the statute is that the Town Manager serves at the will and pleasure of the Board, and therefore has no valid claim of entitlement to continued employment.

Massachusetts case law further supports this interpretation of the statute. In *O'Dowd* v. *Boston*, 149 Mass. 443, 446-447, 21 N.E. 949, 950 (1889), the Supreme Judicial Court interpreted a statute which authorized public officials to remove

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position was that the issue of whether the petitioner had a reasonable expectation of continued employment presented a question of fact for the jury.

Thus, neither of the lower court judges involved in this action ever expressed an opinion on the precise issue decided by the Court of Appeals. Indeed, throughout this action, the respondents have contended that the question of petitioner's entitlement to continued employment presented a question of law to be decided by the court with reference to Massachusetts law and was not an issue to be submitted to a jury. The Court of Appeals ruled that as a matter of law, under Massachusetts decisions, petitioner had no constitutionally-protected property interest in his employment as Town Manager.

employees "for such causes they may deem sufficient and shall assign in their order for removal" as simply qualifying a removal at pleasure by requiring a record to be made of the cause. The Court held that no hearing was required under the statute because *"[w]ith or without a hearing, . . . the appeal in either case is to public opinion."* *Id.* at 447, 21 N.E. at 950. Thus, even though the statute contained the term "cause", the Court ruled that it did not grant an employee any right to continued employment.

In *Fabrizio* v. *City of Quincy*, Mass. App. Ct. Adv. Sh. (1980) 991, 404 N.E. 2d 675, the Massachusetts Appeals Court interpreted a statute virtually identical to the provisions of the Saugus Town Charter. In *Fabrizio*, the Mayor of Quincy could remove the head of a department or member of a board by "filing a written statement with the City Clerk setting forth in detail the specific reasons therefore." *Id.* at 992, 404 N.E. 2d at 676 *citing* M.G.L. c. 43, §54. Again, the Court noted that such a statute simply qualifies a removal at pleasure by requiring a record to be made of the cause, thereby preventing removals for unlawful or frivolous reasons, such as on the basis of race, religion or sex. *Fabrizio* v. *City of Quincy*, *supra* at 992, 993 n.3, 404 N.E. 2d at 677. But most importantly, the Court noted that a discharged employee *"would not be entitled to restoration to his position* if he should succeed in proving that the reasons were in fact untrue." *Id.* at 993, 404 N.E. 2d at 677 (emphasis supplied).

Petitioner cites a number of Massachusetts decisions in support of his contention that the Court of Appeals both misapplied the *Fabrizio* decision and also sanctioned the errors contained in that opinion. The cases relied upon by petitioner, however, are completely consistent with the decision of the Court of Appeals.

First, the petitioner argues that the decision in *McKenna* v. *White*, 287 Mass. 495, 192 N.E. 84 (1934) stands for the proposition that when a removal statute requires a statement of

reasons, it also requires that the reasons be true. This argument is clearly incorrect. Although the *McKenna* decision does require that the removing authority state the actual grounds and motives underlying its action, the court never held or even suggested that the grounds relied upon by the appointing authority must be in fact correct. Nor did the court state that the employee would be entitled to reinstatement to his position upon proof of the falsity of the grounds. Rather, the *McKenna* decision is completely consistent with *Fabrizio* v. *Quincy*, *supra*, in that it merely imposes a restraint upon removals for facially unlawful reasons by requiring immediate and complete publicity of the reasons underlying the action. *McKenna* v. *White*, *supra* at 498, 192 N.E. at 85.

Petitioner also contends the case of *McCarthy* v. *Emerson*, 202 Mass. 352, 88 N.E. 668 (1909) supports his argument that he had a Constitutional right in how the hearing required by the town Charter was conducted. The *McCarthy* decision, however, involved a civil service statute which authorized removals only for "just cause" and for reasons given specifically in writing and which also required a public hearing at which the employee could answer the charges preferred against him. *Id.* at 353, 88 N.E. at 669. Petitioner's reference to the similarity of this statute to the removal provisions of the Saugus Town Charter simply underscores his consistent refusal to recognize that it is the employee's entitlement to continued employment which determines whether a hearing is constitutionally required and if so, what form of hearing is necessary; the mere provision of a statutory right to a public hearing does not in itself create a right to continued employment absent cause for dismissal.

Thus, under Massachusetts Law, it is clear that a removal statute that requires only a statement of the reasons for dismissal simply qualifies a removal at pleasure by requiring a record to be made of the basis for the action. The only protection accorded an employee by such statutes is the right not to

be removed for a reason or cause which, on its face, is unlawful or unconstitutional. *McKenna* v. *White*, 287 Mass. 495, 498, 192 N.E. 84, 85 (1934); *Ayers* v. *Hatch*, 175 Mass. 489, 492, 56 N.E. 612, 613 (1900); *O'Dowd* v. *Boston*, 149 Mass. 443, 447, 21 N.E. 949, 951 (1889); *Fabrizio* v. *City of Quincy*, Mass. App. Ct. Adv. Sh. (1980) 991, 993 and n.3, 404 N.E. 2d 675, 676-677 and n.3. Most importantly, with or without a hearing, the employee's only appeal is to public opinion. *Fabrizio* v. *City of Quincy, supra* at 993, 404 N.E. 2d at 676-77 *quoting O'Dowd* v. *Boston, supra* at 447, 21 N.E. at 951.

Accordingly, the Court of Appeals correctly determined that under Massachusetts Law, a petitioner had no legitimate claim of entitlement to continued employment as Town Manager for the Town of Saugus. The notice and hearing requirements of the Town Charter serve two quite limited purposes:

1. To allow redress for facially invalid reasons such as racial discrimination; and
2. To allow employees to put their case to the public via a public hearing.

The Charter did not impose any substantive restriction upon the removal authority of the Board; petitioner could be dismissed without cause. The Court of Appeals therefore applied prior decisions of this court and ruled that because petitioner had no claim of entitlement to continued employment as Town Manager, he did not possess a property interest protected by the Fourteenth Amendment. *Bishop* v. *Wood*, 426 U.S. 341, 345 n.8, 346 (1978); *Board of Regents* v. *Roth*, 408 U.S. 564, 578 (1972).

II. The Petitioner Has Shown No Conflicts In Judicial Decisions Which Would Justify A Grant Of Certiorari.

Rule 17 of this Court states that review on a writ of certiorari is a matter of sound judicial discretion and will be granted only where there are special and important reasons for the Court's exercise of this jurisdiction. Respondent respectfully submits that the instant case is inappropriate for such review because petitioner has failed to show that the decision of the Court of Appeals:

1) conflicts with the decision of another Court of Appeals on the same matter; or
2) decides an important state question in a way in conflict with applicable state law; or
3) decides a federal question in a way in conflict with applicable decisions of this Court.

Petitioner has not cited a single decision of another Federal Circuit Court which conflicts with the decision in the instant case. Furthermore, the decision of the Court of Appeals is entirely consistent with prior Supreme Court decisions.

The court appropriately determined the nature of the alleged property interest involved by referring to Massachusetts Law. *Curators of the University of Missouri* v. *Horowitz*, 435 U.S. 78, 82 (1978); *Bishop* v. *Wood*, 426 U.S. 341, 344 (1976). The court next applied the appropriate federal standard, namely, whether the petitioner had a legitimate claim of entitlement to continued employment. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). Finally, consistent with the decision of this Court in *Bishop* v. *Wood*, *supra* at 345, n.8 346, the court concluded that petitioner had no property interest in continued employment because he could be fired without cause. The decision of the Court of Appeals was both consistent with and indeed mandated by, prior decisions of this court.

The only ground that even arguably could warrant the granting of certiorari in this case is that the decision of the Court of Appeals conflicts with applicable state law. Petitioner has argued that the Court of Appeals both misapplied Massachusetts Law and sanctioned errors contained in prior Massachusetts decisions. A careful examination of petitioner's argument, however, reveals that his primary contention is that the decision of the Massachusetts Appeals Court in *Fabrizio* v. *City of Quincy*, Mass. App. Ct. Adv. Sh. 991, 404 N.E. 2d 675 (1980) is incorrect. Yet petitioner fails to cite a single Massachusetts decision which supports his contention that the mere existence of certain procedural protection such as the requirements of notice and a public hearing, provides a basis for implying that a removal must be based on cause. In effect, the petitioner is asking this Court to overrule the most recent decision of a Massachusetts Appellate Court on the issues involved in the present case, and further to create a principle of Massachusetts Law for which there is little, if any, precedent in that jurisdiction.

Thus, although the petitioner has attempted to couch his contentions on appeal in terms that implicate the decision of the Court of Appeals, his primary argument concerns the soundness of a decision of a Massachusetts Appellate Court. Under these circumstances, the respondents submit that the instant case is particularly inappropriate for review on a writ of certiorari.

Conclusion

For the reasons set forth in the foregoing discussion, the petition for a writ of certiorari should be denied.

Respectfully sumitted,

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